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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Joint written statement*/ submitted by Habitat International Coalition and the Lutheran World Federation, non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[25 July 2000]

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*/ This written statement is issued, unedited, as received from the submitting non-governmental organization(s).

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THE WTO TRIPS AGREEMENT AND HUMAN RIGHTS

Introduction: A Human Rights Approach to Intellectual Property

Habitat International Coalition, the Lutheran World Federation and the International NGO Committee on Human Rights in Trade and Investment welcomed Sub-Commission resolution 1999/30 (E/CN.4/SUB.2/RES/1999/30), which called for "Governments and economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation," and "to undertake comprehensive and systematic studies, in consultation with United Nations and regional human rights mechanisms and relevant civil society organizations, of the human rights and social impacts of economic liberalization programmes, policies and laws."

Despite the increasing attention being given to economic globalization and human rights, we believe that the human rights implications of specific agreements, such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), have not been sufficiently addressed by the international human rights community. In this statement we try to identify some of the links between human rights principles and instruments and the TRIPs Agreement, and thereby to illustrate how parallel regimes have emerged in which international and regional human rights principles, instruments and mechanisms continue to be marginalized.

An intellectual property regime grants conditional, temporary exclusive rights over inventions, literary works, designs, etc. Human rights law conceptualizes IPRs as conditional on the social benefits that accrue from them. However, the application of IPRs in the industrialized countries and at the international level has focussed almost exclusively on the recognition and protection of the rights of inventors and artists to their creations and on the provision of a commercial incentive for technological innovation.

Intellectual property law requires IPR applications to demonstrate that an invention is original, useful, and non-obvious. A human rights approach to IPRs focuses on their complementarities with all other human rights. Human rights are indivisible, and no human right can violate another. The holistic nature of the human rights approach also complements the provisions of the Convention on Biological Diversity (CBD), which *inter alia* mandates the protection of biological diversity and indigenous knowledge.

In the case of IPRs and other economic, social and cultural rights, an equitable balance must be struck in order to adequately protect the rights of producers of ideas and products and the rights of users and the general public, particularly in developing countries. In the balance, great weight must be given to human rights law, as it is the legal expression of the fundamental elements of human dignity and has primacy in international law.

The WTO TRIPs Agreement

Since 1995, the WTO TRIPs Agreement has set enforceable, international minimum standards for the protection of IPRs.

Under TRIPs, copyright, patent, or trademark infringement in another country is punishable through trade mechanisms by, among other things, cross-retaliation by the country in which the copyright, patent, or trademark is held.

Article 27(3)[b] of TRIPs also requires the patentability of microorganisms as well as microbiological and non-biological processes for the production of life.

The principal human rights instrument that informs the discussion on TRIPs is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by 143 countries.[1] The UN Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the provisions of the Covenant. The Convention on Biological Diversity (CBD)[2] outlines the basic elements for safeguarding biodiversity as well as indigenous and traditional knowledge and practices associated with biodiversity.

Human rights in the TRIPs Agreement

Whilst the TRIPs Agreement does not specifically refer to human rights, it does include several articles providing for measures to limit the extent of IPR protection. The preamble to the Agreement recognizes "that intellectual property rights are private rights," and Article 8(2) notes that "appropriate measures...may be needed to prevent the abuse of intellectual property rights by right holders."

Intellectual property rights in the ICESCR and CBD

ICESCR recognizes intellectual property as a human right in Art. 15(1)[c], which provides that everyone has the right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." The indivisibility of human rights is the basis of the Covenant, in which other articles protect people and communities from the infringement of their economic, social and cultural rights and promote the enjoyment of their economic, social and cultural rights.

The CBD recognizes IPRs3, but not at the expense of environmental sustainability.

Technology Transfer and Development

The objectives of TRIPs4, the ICESCR5, and the CBD6 include technology transfer and development. According to TRIPs Art. 8(1), "Members may, in formulating or amending their laws and regulations, adopt measures necessary to...promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

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[1] Of the 137 WTO member states, 107 have ratified the ICESCR.

[2] Convention on Biological Diversity, adopted June 5, 1992, A/CONF.151/26, 31 ILM 818 (1992)

[3] CBD Art. 16(2): "access to and transfer of technology...shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights."

[4] TRIPs Art. 7: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Moreover, Art. 66(2): "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members."

[5] ICESCR Art. 15(1)[b], recognizes that everyone has the right "to enjoy the benefits of scientific progress and its applications."

[6] CBD Art. 1: "The objectives of this Convention...are the conservation of biological diversity, the sustainable use of its components...including...by appropriate transfer of relevant technologies." Art. 16(1): "access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention."

But TRIPs requires the recognition of patents for 20 years (Art. 33 on patents: "The term of protection available shall not end before the expiration of a period of twenty years.") 97% of all patents are held in industrialized countries, and 90% of technology and product patents are held by multi-national corporations (MNCs)7. This combination in reality signifies that TRIPs hinders important technology transfers to developing countries, and incurs high short-term costs for development. For certain types of technologies the costs can be even longer term. This is particularly a problem when patent monopolies hinder the transfer of environmentally sustainable technologies. Moreover, IPR protection may hinder research and development (R&D) of new drugs and medical technologies in developing countries, which often do not have total pharmaceutical sales volumes approaching the cost of R&D for one new drug.

Patents on Life Forms

Requiring the recognition of patents on life[8] undermines self-determination[9], as it reduces peoples' control over their own genetic and natural resources[10] and may conflict with cultural/religious/social-ethical values in many countries, both developing and developed, as it threatens the sanctity of life.

Food Security

Implementation of TRIPs[9], and the model of plant variety protection, increasingly serves the interests of commercial enterprises in industrialized countries under regimes like the Union for Protection of New Varieties of Plants (UPOV), jeopardizes food security[11] for millions of small farmers in developing countries who are not able to afford brand-name seeds, and impinges on their traditional rights in the area of seed development, procurement and distribution. (Ongoing negotiations under the Food and Agriculture Organisation (FAO) International Undertaking on Plant Genetic Resources, which have significant implications for the food security of tens of millions of people across the world, are also stressing the need to protect the interests and rights of farmers.)

Access to Medicines

TRIPs compromises the access of poor countries and communities to needed pharmaceuticals. This has already impacted AIDS and cancer patients in poor countries, whose essential medicines are not affordable when patent-protected. The commodification of pharmaceuticals and medical

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[7] P. Kingsworth, Jan./Feb. 1999 issue of the *Ecologist*

[8] TRIPs Art. 27(3): "Members may also exclude from patentability...(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."

[9] ICESCR Art. 1(1): "all peoples have the right of self-determination.... They freely determine their political status and freely pursue their economic, social and cultural development."

[10] CBD Art. 3: "States have...the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Art. 15(1) recognizes "the sovereign rights of States over...the authority to determine access to genetic resources." ICESCR Art 1(2): "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation."

[11] ICESCR Art. 11(1): everyone has the right "to an adequate standard of living for himself and his family, including adequate food." Art. 1(2): "In no case may a people be deprived of its own means of subsistence."

techniques, which affect human survival, is contrary to a human rights approach, which places human well-being[12] above commercial advantage.

Biopiracy

IPR protection in practice has in some cases led to the transfer, without consent of their original holders, of genetic resources or knowledge relating to genetic resources, and the subsequent patenting by others of these resources, products or processes, for commercial exploitation. The patentability of life forms and life production processes, e.g. genetically modified organisms (GMOs) and even human genes[9], poses a practical threat to the subsistence, self-determination[13], and cultural participation rights of indigenous peoples[14] and other local communities. It is a matter of concern that TRIPs contains no obligations corresponding to the protection of the rights of communities under the CBD and the proposed revision of the FAO Undertaking, leading to the likelihood that TRIPs will further intensify the "biopiracy" trend mentioned above.

Biodiversity

The protection of IPRs over GMOs[9], especially untested GMOs[15], presents a concern for environmental sustainability and the conservation of biological diversity.

International Cooperation

As the human rights covenants and conventions to which states are parties are legally binding under general international law, no state should violate their own, nor assist or coerce other states in violating their international, pre-eminent legal obligations. Nor should any state violate or assist in violating the human rights of persons not under their jurisdiction.

In fact, States parties to the ICESCR bear a duty to cooperate internationally to realize the legal obligations under the Covenant. Relevant ICESCR articles requiring international cooperation include 2(1), 11, 22, and 23. In particular, Article 15(4) of the ICESCR imparts the duty to "recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields." Article 16(5) of the CBD also recognizes "that patents and other intellectual property rights may have an influence on the implementation of this Convention," and encourages international cooperation "in order to ensure that such rights are supportive of and do not run counter to its objectives."

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[12] ICESCR Art. 12(1): everyone has the right "to the enjoyment of the highest attainable standard of physical and mental health."

[13] CBD Art. 8(j) safeguards the "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity." Art. 15(1) recognizes "the sovereign rights of States over...the authority to determine access to genetic resources," and paragraph 7 articulates "the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources."

[14] ICESCR Art. 1(1): "all peoples have the right of self-determination.... They freely determine their political status and freely pursue their economic, social and cultural development." Art. 1(2): "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation.... In no case may a people be deprived of its own means of subsistence." Art. 15(1)[a]: everyone has the right "to take part in cultural life." Art. 15(2): "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."

[15] CBD Art. 8(g): "regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts...taking also into account the risks to human health."

Ensuring that the outcome of international economic negotiations does not entail the violation of ICESCR obligations requires international solidarity.

Conclusion

As illustrated above there are numerous human rights implications of the TRIPs Agreement. Given the role of the Sub-Commission in drawing the attention of the international community to the human rights implications of economic globalization, we urge the Sub-Commission to take concrete action on TRIPs. In doing so the Sub-Commission must reassert the primacy of human rights obligations over the commercial and profit-driven motives upon which agreements such as TRIPs are based.

In this spirit, HIC, LWF and INCHRITI encourage discussion in the Sub-Commission on TRIPs, under its agenda item on economic, social and cultural rights and in its Working Group on Transnational Corporations (TNCs).